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No. 81-2124

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

BOSTON ASSOCIATION OF SCHOOL
ADMINISTRATORS AND SUPERVISORS, AFL-CIO
Petitioner,
v.
TALLULAH MORGAN, et al,
Respondents

No. 81-2306

LOCAL 66, BOSTON TEACHERS UNION
AFT-AFL-CIO,
Petitioner,
v.
BOSTON SCHOOL COMMITTEE, ET AL,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

RESPONDENT MASSACHUSETTS BOARD OF EDUCATION'S BRIEF IN OPPOSITION

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RESPONDENT MASSACHUSETTS BOARD OF EDUCATION'S BRIEF IN OPPOSITION

The respondent Massachusetts Board of Education respectfully requests that this Court deny both petitions for writ

of certiorari, seeking review of the First Circuit's opinion in this case. That opinion is reported at 671 F. 2d 23.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Court has previously denied certiorari to petitioner Boston Teachers Union ("BTU") on substantially similar claims.

Petitioner BTU's claim that the orders below fail to cure a constitutional violation, since the absence of a 20% black faculty does not offend the constitution (BTU Petition, pp.11-15), simply reiterates a previously mounted and failed challenge to prior orders in this litigaion, and thus does not now warrant plenary consideration by this Court. Among its liability findings in

1974, the district court found that defendant Boston School Committee knowingly violated the constitutional right of public school students to have the school system operated free of racial discrimination in the recruiting, employment and promotion of teachers and staff. Morgan v. Hennigan, 379 F. Supp. 410, 456 (D. Mass. 1974). Included among its orders seeking to "eliminate every form of racial segregation in the public schools of Boston, including all consequences and vestiges of segregation previously practiced by the defendants," Id., at 484, have been orders directed toward faculty desegregation. These orders, previously entered and sustained on appeal, are the law of the case.

Interim orders entered on July 31, 1974, effective only for the 1974-1975 school year, mandated a hiring rate of

one new black teacher for each new white teacher hired, and directed proportionate assignment of black faculty throughout the school system. When the BTU challenged those orders as unrelated to the constitutional violation, the United States Court of Appeals for the First Circuit rejected the union's argument as "untenable as a challenge to remedies ordered to begin the dismantling of a dual school system." Morgan v. Kerrigan, 509 F. 2d 580, 600 (1st Cir., 1975) cert. denied, 421 U.S. 963 (1975).

In 1975, the district court entered its remedial orders for faculty desegregation, requiring, among other things, a continuation of one-to-one hiring until 20% of the faculty was black, with additional affirmative action obligations to continue until 25% of the faculty was

black. Morgan v. Kerrigan, 388 F. Supp. 581 (D. Mass., 1975). The BTU appealed this order, specifically questioning the propriety of a 20% hiring goal; but the appellate court again affirmed the lower order, specifically finding that the 20% hiring goal was not an abuse of discretion. Morgan v. Kerrigan, 530 F. 2d 431, 434 (1st Cir., 1976). This opinion, and its endorsement of the 20% hiring goal, was the subject of a previous petition for a writ of certiorari, No. 75-1527, which petition was denied. 426 U.S. 935.

Similarly, a 1976 district court order, reprinted at pp. A23-A34 of petitioner Boston Association of School Administrators and Supervisors' ("BASAS") petition, mandated among other things, one-to-one hiring of administrators in specified categories until 20% of the

administrative staff was black, with additional affirmative action obligations to continue until 25% of the administrative staff was black. That order was not appealed and remains the law of this case.

II. The Court below fully considered and correctly decided the issues, applying the appropriate constitutional standards.

The 20% black staff requirement is not merely an internal affirmative action goal as petitioners characterize it in their petitions; it is instead a judicially-imposed remedial step towards the attainment of a unitary school system. Thus, when defendant School Committee sought authorization to lay off teachers so as to preserve the then-current 19.09% level of black faculty,

the courts below properly analyzed the request under the three-pronged test for remedial orders in school desegregation cases articulated in Milliken v. Bradley, 433 U.S. 267 (1977) (Milliken II). First, given the liability finding that the creation and maintenance of a dual school system had deprived black children and parents of equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution, the request to preserve a partially achieved, previously ordered remedy was "related to the condition alleged to offend the constitution." Milliken II at p. 280, citing Milliken v. Bradley, 418 U.S. 717, 738 (1974) (Milliken I); Morgan v. O'Bryant, 671 F. 2d 23, 26 (1st Cir., 1982). Second, by preserving the then current level of black faculty, a level obtained only through the

imposition of prior remedial orders to redress constitutional deprivations by defendant School Committee, the orders sought "as nearly as possible to restore the victims of discriminatory conduct, " here the black school children, "to the position they would have occupied in the absence of such conduct." Milliken II at p. 280, citing Milliken I at p. 746; Morgan v. O'Bryant, Id. at 27-29. Third, by endorsing the proposal of defendant School Committee, the local authority most directly affected by the orders, the lower courts obviously "[took] into account the intent of state and local authorities in managing their own affairs, consistent with the Constitution." Milliken II at pp. 280-281; Morgan v. O'Bryant, Id. at 29.

A similar Milliken II analysis led the courts below to reject defendant School Committee's motion to modify remedial orders regarding school-based administrators so as to permit, through layoffs based on seniority, a reduction of the then-current 20.53% level of black principals and headmasters. The analysis is identical to that regarding faculty layoffs in relation to the first two prongs of the Milliken II test; and while, in the area of administrative staff reductions, the courts rejected a proposal from local authorities, the third prong of Milliken II was satisfied. Further, Milliken II does not prohibit federal courts from ordering school authorities to act or refrain from acting where their proposed policies would not represent "good faith implementation of the governing constitutional principles."

Brown v. Board of Education, 349 U.S. 294, 299 (1955) (Brown II). In such circumstances, where the preferences of local authorities indicate a failure to meet the affirmative obligation to eliminate racial discrimination root and branch, judicial authority is properly invoked. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971), citing Green v. County School Board, 391 U.S. 430, 437-438 (1968); Morgan v O'Bryant, Id. at 29. The requirement that the Court consider the preferences of the local authorities does not mandate that the Court defer to a policy which will perpetuate the effects of invidious racial discrimination.

III. The cases relied on by petitioners are distinguishable on their facts.

Both petitions, through extensive argument and citation, attempt to redefine the nature of this litigation. As the Court of Appeals noted in an earlier challenge to remedial orders involving teacher hiring:

> "Appellants seem to premise much of their argument on the assumption that the district court's orders relating to faculty and staff must be confined to those actions necessary to vindicate the rights of black teachers and applicants for positions who have been discriminated against. Appellants misapprehend the nature of this case. While the district court properly examined defendants' hiring, transfer, and promotion policies, it did so to determine whether those policies violated the rights of black school children. It is the rights of those children that the district court must now protect."

Morgan v. Kerrigan, 509 F. 2d 599, 600 fn. 3 (1975).

In a later reiteration of this point,

the appellate court noted:

> "The plaintiffs are not the black teachers or would-be teachers who have been discriminated against because of their race. . . It is the rights of those [black Boston public school] children that the order in issue is intended to protect."

Morgan v. Kerrigan, 530 F. 2d at p. 432.

References to Title VII of the Civil Rights Act of 1964, and cases decided under that statute, are therefore misguided, since this is not a Title VII employment discrimination case. Similarly, citation of cases construing the equal protection clause of the Fourteenth Amendment in cases of employment policy misses the point that this litigation involves the vindication of the constitutional rights of black school children. This case is a school desegregation case. Petitioners should more properly address the line of cases which emphasizes the relationship between faculty-staff

considerations and school desegregation. See e.g. Rogers v Paul, 382 U.S. 198 (1965); Bradley v School Board of City of Richmond, 382 U.S. 103 (1965); United States v. Montgomery County Board of Education, 395 U.S. 225 (1969); Swann v Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1979); Morgan v. Kerrigan, 509 F. 2d 580 (1st. Cir., 1974). After all, staff segregation "is among the most important indicia of a segregated system." Swann, Id. at p. 18 citing Green v. County School Board, 39 U.S. 430 (1968).

IV. Petitioners'arguments regarding public policy and balancing of equities are without merit.

Both petitions, and particularly that of the BTU, make policy arguments intending to demonstrate the need for

this Court to grant certiorari so that it may more properly balance the equities. These arguments are misquided and often contrary to the facts.

(1) The BTU is in error when it states that "long-term white teachers... carry the entire burden of accomodating to a sharply reduced school budget." (BTU Brief, p.9). Under the challenged order, which mandated that the current percentage of black teachers be retained, the substantial number of layoffs at issue clearly reached black teachers, albeit less senior black teachers, as well as white teachers.

(2) The cases concerning layoffs of police and firefighters, cited at p.10 of the BTU Brief, need not be considered in conjunction with the present case. Those opinions involve the interpretation of consent decrees and the propriety of

orders enforcing the decrees as so interpreted. This case concerns the achievement of a remedy after a finding of liability under the United States Constitution. Furthermore, the controversy involving police and firefighter layoffs directly implicated a state civil service statute. Mass. G.L. c.31, §39. The state civil service statute does not apply to teachers, and this case therefore presents no conflict between a duly enacted statutory scheme and remedial orders of the Court.

(3) Both petitions gloss over the impact of allowing layoffs based on strict seniority. The percentage of black teachers in the Boston Public Schools was 7.1% at the time of the liability finding. As the BTU notes, defendant School Committee projected that the then-current 19.09% of black teachers

would drop to approximately 8% if 1200 layoffs were conducted in June 1981 according to strict seniority; the defendants also indicated that the elimination of an additional 400 positions, contemplated at the time of their motion, would have reduced the number of black teachers in the system to below 5%. BASAS acknowledges that, had the contemplated layoffs been achieved through strict seniority, the then-current level of 20.53% black principals and headmasters would have fallen to 13.8%. Both petitioners ignore the directive of this Court that a district court is obligated to exercise continuing jurisdiction until it is clear that state-imposed segregation has been completely removed. Green v. County School Board, Id. at 439.

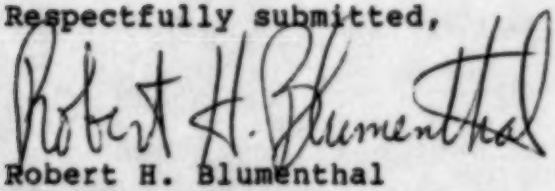
(4) Both petitioners attack the orders on policy grounds, although a reversal of these orders would create its own policy anomalies. Had the district court been prohibited from protecting its previous remedial orders through conditional orders requiring that any layoffs that defendant School Committee chose to implement must be conducted so as to preserve current percentages of black staff, a situation would have arisen in which either (a) layoffs would have eliminated gains made in pursuit of a constitutional remedy under long-standing orders, or (b) the threatened nullification of the remedy would have prohibited defendant School Committee from conducting any layoffs in response to financial constraints unrelated to desegregation. Given the alternatives,

the lower courts were correct as a matter of public policy as well as law.

CONCLUSION

For these reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,



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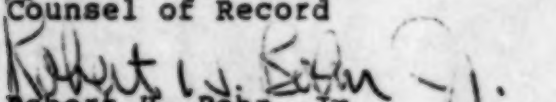

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DATED: July 16, 1982

CERTIFICATE OF SERVICE

I, Robert H. Blumenthal, counsel of record, hereby swear that I have this day served the within Respondent Massachusetts Board of Education's Brief in Opposition by mailing three copies postage prepaid to: Paul F. Kelly and Richard W. Coleman, 11 Beacon Street, Boston, Massachusetts, 02108, counsel for petitioner Boston Association of School Administrators and Supervisors, AFL-CIO; and to Bruce A. Miller, 2400 First National Building, Detroit, Michigan, 48226, counsel for petitioner Local 66, Boston Teachers Union, AFT-AFL-CIO.

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Celia C. De Angelis
Notary Public
My Commission expires: 11/14/86

DATED: July 16, 1982